Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL POSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is reported at 607 F. 2d 1007 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1979 (Pet. App. 1-2). A timely petition for rehearing was denied on November 15, 1979 (Pet. App. 3). The petition for a writ of certiorari was filed on December 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in revoking petitioner's probation on the ground that he had intentionally attempted to disguise his handwriting when furnishing court-ordered handwriting exemplars.

STATEMENT

1. Petitioner was convicted in the United States District Court for the Northern District of Illinois of conspiring to violate federal gambling laws, in violation of 18 U.S.C. 371, and was sentenced in 1976 to a four-year term of probation. In May 1978, after being advised by Illinois law enforcement officials that petitioner had been charged with gambling and keeping a gambling house in violation of Illinois law, the government moved in the district court for an order requiring petitioner to show cause why his probation should not be revoked. During the course of the resultant probation revocation proceedings, the government, on July 10, 1978, moved in the district court for an order directing petitioner to furnish handwriting exemplars to "be used solely for the purpose of identif[ying]" documents in the FBI's possession that might be introduced at the anticipated revocation hearing (Pet. App. 4). Paragraph 2 of the motion stated, in pertinent part, that "[t]he Government, however, possesses no known samples of [petitioner's] handwriting" (*ibid.*).

At a hearing on the motion, held that same day, the court questioned whether exemplars were necessary, noting that the government already possessed probation reports signed by petitioner (July 10, 1978 Tr. 5). The prosecutor explained that the signatures on the reports were not known to be genuine and that the government

needed samples of printing as well as signatures (*id.* at 5-6). The court then concluded that "the government is entitled to get his handwriting more than they have already" (*id.* at 8), and over petitioner's objection entered an order accordingly (*id.* at 9; Pet. App. 5).

Three days later, petitioner produced the exemplars, but in so doing attempted to disguise his normal handwriting. The government cited this defiance of the court's order as an additional ground for revocation of petitioner's probation (see Government's Petition for an Amended Order to Show Cause, filed July 21, 1978). The revocation hearing was held in late September and early October 1978. Following testimony by the government's handwriting expert, petitioner moved to suppress the exemplars on the ground that in seeking them the government knowingly had stated falsely that it possessed no known samples of petitioner's handwriting. In response, the government elicited testimony from its expert that prior to July 10 (the date of the motion for production of the exemplars) the only samples of petitioner's writing it possessed were probation reports and bank checks purporting to bear petitioner's signature (Oct. 6, 1978 I-Tr. 2-3).[1] The expert testified that these documents were insufficient for comparison purposes not only because their genuineness had not been established, but also because (1) the documents were copies rather than originals (*ibid.*), (2) disclosure of the checks had not yet been authorized by the Internal Revenue Service (*id.* at 3-4), and (3) the documents lacked needed "[h]and printing and numerals" (id. at 20). The exemplars were

[1]Although the record is unclear on this point, the government also may have possessed a document referred to as an "assumed name certificate" (Oct. 6, 1978 I-Tr. 18).

sought after the expert advised the prosecutor of the inadequacies of the documents then on hand (*id.* at 5).

Subsequently, after concluding that petitioner had in fact disguised his handwriting, the district court denied the motion to suppress the exemplars, finding that there had been no intentional misrepresentation in the government's July 10 motion for production and that "at the most there might have been some misunderstanding as to the question [asked] the expert or the status of the evidence when the order [to produce the exemplars] was entered" (Nov. 27, 1978 Tr. 4). The court added that it had not labored under any misunderstanding when it entered the order (*ibid.*).

The court then ordered petitioner's probation revoked on two grounds—his failure to obey the order to provide true handwriting exemplars and his failure to refrain from gambling, as evidenced by two state misdemeanor charges to which he had pleaded guilty (Nov. 27, 1978 Tr. 2, 12, 25). It sentenced him to a three-year term of probation on the condition that he serve six months in a work release program (*id.* at 30). The court of appeals affirmed (Pet. App. 1-2).

ARGUMENT

1. Petitioner argues (Pet. 8-10, 12-14) that the government misrepresented crucial facts in its application for the handwriting exemplars and that for that reason his probation should not have been revoked. At bottom, petitioner claims that the government's statement in its moving papers (Pet. App. 4) that it possessed "no known samples of [petitioner's] handwriting" was intentionally misleading. However, as the district court found, that statement was not false and did not mislead.

Although the government possessed certain documents purporting to bear petitioner's signature, those documents were not "known samples" in that the government was not certain at the time that the handwriting in them was in fact petitioner's. Furthermore, the available documents were inadequate for handwriting comparison purposes. See page 3, *supra*. The prosecutor so advised the court, albeit in general terms, at the hearing held the day the motion was filed. Thus, in context, the challenged statement was not false.

Nor was it misleading. Petitioner had been provided copies of most of the documents in the government's possession. When entering its order, the court knew of the existence of these documents but concluded that the government had demonstrated a need for a fuller handwriting sample. The court's conclusion was borne out by the handwriting expert's subsequent testimony.

In any event, even if the government's representation had been false and misleading, petitioner would not be entitled to have the probation revocation order overturned. Whatever the basis for the court's order, petitioner was obligated to comply with it in good faith or to challenge it in a proper fashion. His attempted evasion of the order was contumacious even if the order was premised on a misunderstanding by the court or a misstatement by the government. See *Maness* v. *Meyers*, 419 U.S. 449, 458-459 (1975); *Walker* v. *City of Birmingham*, 388 U.S. 307, 313-315 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 293-294 (1947). The subject of a court order must ordinarily obey that order or seek to overturn it by orderly means; violating the order is not an appropriate method of challenging its

validity or the validity of the factual premises on which the order was based.[2]

Petitioner's reliance on *Franks* v. *Delaware*, 438 U.S. 154 (1978), is misplaced. That case involved a challenge to the admissibility of evidence seized under the authority of a search warrant obtained as the result of knowingly or intentionally false statements. Wholly different considerations govern when a court order rather than a warrant is at issue.

2. Petitioner next contends (Pet. 10-12) that the district court was without power to order him to furnish the handwriting exemplars without a preliminary showing of need. Again, however, petitioner's argument is based on a false factual premise. Contrary to petitioner's assertion, the government did make a showing at the July 10 hearing that it needed handwriting exemplars, and the district court expressly found that the government had established that need (July 10, 1978 Tr. 8).

As a legal matter, petitioner cites no authority for the proposition that a preliminary showing must be made before a court can order a probationer to furnish an exemplar to be used in a probation revocation proceeding. While acknowledging that in *United States* v. *Mara*, 410 U.S. 19 (1973), this Court specifically held that no preliminary showing of reasonableness was needed to support an order compelling production of handwriting exemplars in response to a grand jury

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[2]If petitioner believed the order was improper, he could have sought review by declining to execute the exemplars and being placed in contempt. Review of the contempt citation would then have been available in the court of appeals. See *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971).

subpoena, petitioner contends that the reasoning of *Mara* is confined to the grand jury context. Even if petitioner is correct that *Mara* should be thus limited (but cf. *United States* v. *Euge*, No. 78-1453, (Feb. 20, 1980), his remedy was to challenge the order directly, not to seek to subvert it by disguising his handwriting. As with orders to give testimony, the proper remedy is to challenge the order, not to dissemble in responding to it. See *United States* v. *Mandujano*, 425 U.S. 564, 577 (1976) (plurality opinion); *United States* v. *Knox*, 396 U.S. 77, 79-80 (1969); *Bryson* v. *United States*, 396 U.S. 64, 71-72 (1969); *Dennis* v. *United States*, 384 U.S. 855, 865-866 (1966).

3. Finally, petitioner argues (Pet. 14-18) that under the circumstances of this case the government's conduct created a "situation functionally equivalent to entrapment" (Pet. 14) and therefore rendered it unconscionable for the district court to revoke his probation for disguising his handwriting.

Petitioner appears to challenge the district court's factual finding that he intentionally disguised his handwriting (see Pet. 14-15 & n.25). That finding, however, was supported by the evidence and was upheld by the court of appeals (Pet. App. 2). Accordingly, it is not open to challenge here. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Petitioner also premises his entrapment argument on the assertion that the government made an intentionally misleading statement to the court in its motion. This contention, too, was expressly rejected by the district court in a finding upheld by the court of appeals (Pet. App. 2).

Even if the factual premises underlying petitioner's argument were correct, his entrapment argument would still lack substance. He was not enticed into disguising

his handwriting by the importuning of federal agents. The law enforcement officers sought natural and fully representative exemplars; nothing in the record even remotely suggests that it was their purpose to lure petitioner into disguising his handwriting and subjecting himself to probation revocation on that ground. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423 (1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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